



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 15, 1996

Ms. Jennifer Soldano  
Assistant General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR96-0725

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. You have received several related requests for information. Your requests were assigned ID#s 39715, 39797, 39871, 39872, 40016, 40017, 40286, 40519, and 40591.

The Texas Department of Transportation (the "department") received requests for information seeking:

1. any audits of District 16 performed by the department within the past 24 months including internal and external memos and correspondence;
2. the complaint filed by Andrea Nelson with the Texas Commission on Human Rights;
3. the personnel records of Tom Word and Andrea Nelson;
4. the personnel files of Sharlotte Teague;
5. any report made by investigators with the department's Civil Rights Division on Andrea Nelson;
6. the number, names, addresses and phone numbers of employees in the Corpus Christi district office who have taken early retirement since Jan. 1, 1995;

7. the names and applications of all people who applied for the Director of Administration job in Corpus Christi which was filled in January 1994;

8. all documents pertaining to the low bid of Williams Brothers, Inc. where Balfour Beatty was the low bidder; and

9. all cellular phone records from the Corpus Christi district office including bills and any reimbursements.

You state that the information concerning the number of employees who have taken early retirement, along with the list of these employees' telephone numbers and addresses have been provided to the requestor within the provisions of section 552.117 of the Government Code. You assert, however, that the remaining requested information is excepted from required public disclosure under sections 552.103, 552.107 and 552.114 of the Government Code. You have submitted the requested material you seek to withhold to this office for our review.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you have shown that a department employee has filed a formal employment discrimination complaint with the Texas Commission on Human Rights (the "T.C.H.R. complaint"). You state that the claim relates to the office practice, the hiring process, and the management of the Corpus Christi district office. You have also provided information to this office that another department employee "is being sued for alleged libel and slander which supposedly occurred while she was engaged in discharging

her official duties." You have submitted the pleadings in that cause, *Marvin Lee Berry and Kenneth Berry v. Sharlotte L. Teague*, No. 95-5188-G (319th Dist. Ct., Nueces County, Tex., Sept. 11, 1995). You also explain that the state is defending the department employee in that suit.

After reviewing the submitted documents, we conclude that litigation is reasonably anticipated with respect to the T.C.H.R. complaint and that most of the documents submitted by the department are related to that litigation for the purposes of section 552.103(a). Open Records Decision 336 (1982). Regarding ID# 39517, you claim that five particular documents are protected from disclosure pursuant to sections 552.103 and 552.107(1). We believe that the department may withhold from required public disclosure the first three of those documents as outlined in your letter for decision because they are related to the *Teague* litigation. We have marked those three letters that may be withheld pursuant to section 552.103. Regarding ID# 40016, which concerns the personnel files of Sharlotte Teague, we similarly conclude that the records may be withheld because they relate to the *Teague* litigation.

Among the submitted materials, however, there appear to be documents to which the opposing party in the T.C.H.R. complaint has already had access, *i.e.*, Ms. Nelson's application for employment, Ms. Nelson's employment discrimination complaint, and the anonymous complaint letters sent to the department's Executive Director. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). Moreover, we conclude that the documents to which Ms. Nelson has already had access are not related to the *Teague* litigation. Hence, these documents may not be withheld because of either the anticipated or the pending litigation. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also claim that certain records contained within the Director of Administration applications are protected from disclosure by section 552.114 of the Government Code. However, section 552.114 protects information only when it is in the custody of an "educational institution." Open Records Decision No. 480 (1987). Therefore, you may not withhold the information pursuant to section 552.114. *See* Open Records Decision Nos. 480 (1987); 390 (1983) at 3.

Additionally, you raise section 552.107(1) in regard to five particular documents within the materials responsive to the request for any audit reports in ID# 39715. We have already concluded that the department may withhold from required public disclosure the first three of those documents as outlined in your letter pursuant to section 552.103 of

the Government Code and thus we need not consider your section 552.107(1) claim as to those documents. The fourth document is a request from Mr. Richard Monroe to Ms. Sarah Shirley, Chair of the Opinion Committee of this office. The fifth document is a letter from Mr. Richard Monroe to Mr. David Talbot, Chief of the Transportation Division of this office, who represents the department in the *Teague* litigation. After reviewing the submitted materials, we conclude that neither of these documents relates to the *Teague* litigation or the T.C.H.R. complaint. Thus, we will address whether these two documents are protected by section 552.107(1) of the Government Code.

Furthermore, you claim that specific documents contained within the requested information in ID# 40519 are protected by section 552.107(1). The first document is a letter to Mr. Ed Shaddock from Mr. Jesse W. Ball. The second letter is to Mr. Tom Word from Ms. Yolanda Grimes. The third document is a letter to Mr. Tom Word from Ms. Vanessa A. Gonzalez. We conclude that none of these three documents are related to either the *Teague* litigation or the employment discrimination claim and may not be withheld under section 552.103. Thus, we will also address whether these three documents are protected by section 552.107(1) of the Government Code.

Section 552.107(1) states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

This exception applies to attorney advice and opinion rendered to a client and to client confidences. See Open Records Decision No. 574 (1990). We do not believe section 552.107(1) applies to the letter to Ms. Shirley. Mr. Monroe sought an open records decision from this office and no attorney-client relationship exists in that circumstance. In contrast, we conclude that section 552.107(1) applies to the letter to Mr. Talbot. Accordingly, the department may withhold that letter from required public disclosure. Likewise, we conclude that section 552.107(1) also applies to the three specific letters contained within the information in ID# 40519 as outlined above. Thus, the department may withhold these three letters from public disclosure. We have marked those documents which the department may withhold pursuant to section 552.107(1).

In summary, the department may withhold the requested information pursuant to section 552.103 except for those documents to which the opposing party in the T.C.H.R. complaint has already had access. These documents must be made public. The department may also withhold the specific letter documents excepted by section 552.107(1) except for the letter to Ms. Shirley which must be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref.: ID#s 39715, 39797, 39871, 39872, 40016, 40017, 40286, 40519, and 40591

Enclosures: Submitted documents

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